TOWARDS A SENTENCING POLICY FOR THE USE OF SHORT PRISON SENTENCES IN SCOTLAND

NEIL HUTTON *

There has been recent public concern in Scotland about the use of short prison sentences. This article reviews the available evidence about the use of these sentences, considers sentencing policy on this issue and makes proposals for a more rational approach to the use of short sentences.

Introduction

Although the concern with the use of short prison sentences (six months and less) is not new, there has been increased public debate recently, prompted in part by the activity of the first Scottish Parliament. The Prison Estates Review[1] drew attention to the overcrowded conditions in Scottish prisons and recommended the construction of three new prisons. These plans have been shelved for the time being, in the light of considerable public and parliamentary opposition to these plans. Put simply, the argument was that Scotland should not build more prisons on the basis of projections of increased prison populations without looking to see what could be done to at least slow down the increase. Why does Scotland have the third highest rate of imprisonment in Western Europe?[2]

This debate was continued in the review into alternatives to custody conducted by the Justice 1 Committee.[3] Many of those who provided evidence to the Committee expressed concern at the limited effectiveness of short prison sentences, including a number of academics, the Association of Directors of Social Work, a wide range of voluntary sector agencies, the Scottish Prison Service and the Sheriffs' Association. The report of the review makes many recommendations, intended to increase the use of non-custodial sentences as alternatives to short custodial sentences.

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[1] Scottish Prison Service, *Prisons Estates Review* (2001), *www.scotland.gov.uk/consultations/justice*.

[2] R. Walmsley, *World Prison Population List* (Home Office Research Findings, no.188; 4th ed., 2003). The rise cannot be accounted for by increases in crime rates, which have decreased. For international comparisons, see J. N. Van Kesteren, P. Mayhew and P. Nieubeerta, *Criminal Victimisation in Seventeen Industrialised Countries: Key Findings from the 2000 International Crime Victim Survey* (2000).

[3] *www.scottish.parliament.uk/official_report/cttee/just1-03/jlr03-03-vol01-01.htm#8*.

The Scottish Consortium on Crime and Criminal Justice is a coalition of most of the major voluntary sector criminal justice organisations in Scotland. In its first report, the Consortium recommended that the power to imprison should be removed from the summary courts, as a means of reducing the prison population.[4] SACRO (Safeguarding Communities, Reducing Offending), a member of the Consortium, echo this in their manifesto.[5] Finally, the Criminal Justice Forum, a policy think tank within the Scottish Executive, has recently published a report on short-term sentences, which also contains a list of recommendations designed to increase the use of community sanctions as alternatives to short custodial sentences.[6]

Although not all of these organisations share precisely the same perspective, there is a common thread of argument running through them. The international research evidence shows that short prison sentences are, at best, no more effective than community sanctions in reducing offending behaviour.[7] They are considerably more expensive. It would therefore be rational to make greater use of community sanctions as alternatives to short prison sentences.

Recent research, conducted for the Justice 1 Committee, has shown that the public understand that community sanctions can be more effective than short prison sentences for less serious offenders who do not pose a threat to public safety.[8] Research conducted across the United Kingdom, sponsored by the Esmee Fairbairn Trust, suggests that the public are initially resistant to community sanctions, as they perceive them to be "soft". However, respondents want the criminal justice system to deliver a safe community and they appreciate that community sanctions, particularly those associated with the values of reparation and learning how to live a good life, could deliver safety more effectively than custody.[9]

How Can a Reduction in the Use of Short Prison Sentences Be Achieved?

The reports and organisations mentioned above make a great number of recommendations, *e.g.* improving the information about community programmes available to sentencers, increased resources to ensure uniform national provision of community programmes, increased funding for supervised attendance orders, better information for sentencers on effectiveness of

[4] Scottish Consortium on Crime and Criminal Justice, *Rethinking Criminal Justice in Scotland* (2001), *www.scccj.org.uk*.

[5] SACRO, *Manifesto* (2003), *www.sacro.org.uk*.

[6] Scottish Executive, *Short Term Prison Sentences: A Report to the Criminal Justice Forum* (2003), *www.scotland.gov.uk*.

[7] J. McGuire, *What Works: Reducing Offending* (1985).

[8] S. Anderson, D. Ingram and N. Hutton, *Public Attitudes towards Sentencing and Alternatives to Imprisonment* (Scottish Parliament Paper 488, Session 1, 2002), *www.scottish.parliament.uk/official_report/cttee/just1-02/jlr02-pats-01.htm*.

[9] M. Stead, L. McFadyen and G. Hastings, "What Do the Public Really Feel about Non-Custodial Penalties?" in *Rethinking Crime and Punishment* (2002).

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The Use of Short Prison S

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2000	12,50
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community sanctions, etc. None, however, makes any recommendations on sentencing policy. This is widely seen as the province of the judiciary and, therefore, beyond the remit and scope of the organisations concerned. I want to consider this argument later. First, I want to examine the evidence about short-term sentences.

The Use of Short Prison Sentences in Scotland

The maximum sentence in the summary courts is six months (exceptionally, this can be longer). Almost all short custodial sentences are passed by the summary courts. To ask about short prison sentences is therefore to ask about the custodial sentencing policy of the summary courts and, in particular, the sheriff summary court.[10]

Sentences of Six Months or Less

1990	11,000
1996	13,800
2000	12,500
2001	13,613

Although there was a decline in the absolute numbers of people receiving short sentences between 1996 and 2000, 2001 saw the level rise to close to the 1996 high point. The relative use of short-term sentences has increased considerably, just as the use of imprisonment has increased from 7 per cent in 1990 to 14 per cent in 2001. This can partly be explained by an overall reduction of 23 per cent in the total numbers of persons sentenced by the courts. Assuming that many of the cases which no longer reach court are at the less serious end of the scale, a rise in the proportionate use of imprisonment would be expected. However, the prison population has increased also in absolute terms and, even allowing for the fall since the high point in 1996, there has still been an absolute increase in the use of short-term prison sentences between 1990 and 2001.

Sentences of six months or less accounted for 82 per cent of all custodial sentences passed by the courts in 2001. Prisoners serving less than six months accounted for almost 10 per cent of the average daily population in 2001. However, prisoners of under six months account for 60 per cent of receptions into prisons (95 per cent of receptions are serving sentences of less than four years). Changes to the numbers of short-term prisoners will have only a modest impact on the average daily population. However, the Scottish Prison

[10] In 2001, the stipendiary magistrates in Glasgow sent 17% of convicted offenders to prison, the sheriff summary courts sent 17% of convicted offenders to prison and the district courts around 1%.

Service resources used in receiving and releasing short-term prisoners is very significant. A reduction in the number of short-term receptions would release resources which could be put to more productive use in other areas of the Scottish Prison Service's work.

Around 50 per cent of short-term prisoners are re-convicted within two years of their release from prison.[11] This is much higher for young offenders who received short sentences—around 78 per cent.[12] Other figures released by the Scottish Executive show that 63 per cent of males released from short sentences are re-convicted within two years, and 73 per cent of under-21s are re-convicted.[13]

A total of 25,000 prisoners are released every year from Scottish prisons—23,000 of these are prisoners serving less than four years. At a conservative estimate, around 13,000 of these will be re-convicted. We do not know how many will re-offend without coming to the attention of the police.

Who Gets Short Prison Sentences?

The published statistics provide some assistance in answering this question but this is limited because of the breadth of the offence categories and the lack of cross-referencing with criminal record data or other data which affect the assessment of the seriousness of the case.

Eighty-two per cent of all custodial sentences are for six months or less. Although the proportion is slightly higher for those aged under 21 (86 per cent), there is not much difference between the age groups (21–30: 82 per cent, 30+: 77 per cent). That is, short sentences are used for all age groups of offenders.

They are also used for the full range of offence types.

Custodial Sentences of Six Months or Less by Crime/Offence Category 2001

Crimes	
Serious crimes of violence	222
Indecency	42
Dishonesty	6,004
Criminal damage	270
Offensive weapons	607
Drug offences	417
Other crimes	957

[11] Scottish Prison Service, *Reconviction Rates* (2000).

[12] SACRO, *Reconviction Rates for Young Offenders* (2002), *www.sacro.org.uk*.

[13] Scottish Executive, *Reconvictions of Offenders Discharged from Custody or Given Non-Custodial Sentences in 1995, Scotland* (Statistical Bulletin Cr.J./2001/1), *www.scotland.gov.uk/stats/bulletins/00052-02.asp*.

Offences
Simple assault
Breach of the peace
MV offences
Other offences

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Criminal Record

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Offences	
Simple assault	1,192
Breach of the peace	1,109
MV offences	1,063
Other offences	1,727

The first point to make is that all of these crimes and offences have been prosecuted under summary jurisdiction. This is an indication of the Crown's assessment of their seriousness. These are, by definition, not very serious offences. Around 15 per cent of these offences involve some level of violence or the threat of violence, although, again, these are not serious offences of violence. The vast majority involve no violence and most of these are offences of dishonesty.

Criminal Record

Eighty per cent of those receiving short sentences have previous convictions. Forty-nine per cent of males had over 10 previous convictions, and 67 per cent of males had at least one previous custodial sentence. Seventy-two per cent had previous convictions for crimes of dishonesty.

Sixty-nine per cent of the males had no previous solemn convictions, and the same proportion had no previous convictions for violent offences.

From these limited data, we can make some tentative, general observations about those sentenced to short prison sentences. They are predominantly males who have already served short prison sentences for offences of dishonesty. The great majority have no serious previous convictions (*i.e.* no previous convictions under solemn jurisdiction) and have no record of violence. The conclusion appears to be that the great majority of those sentenced to short prison sentences are recidivist, petty thieves.

Sentencing Policy

The sentencing policy on the use of imprisonment (in so far as there can be said to be a policy) is laid down in the Criminal Procedure Scotland Act 1995, s.204(2) and (3), which provides that custody should only be used when no other sentence is appropriate. This is a statement of the principle of parsimony which, more generally, states that the sentence chosen should be the least onerous sanction which will achieve the appropriate sentencing aims. The effect is that judges must have reached the conclusion that fines and the range of community sanctions are not appropriate, so that custody remains the only option. This raises the question of the sense in which community sanctions are "alternatives" to custody. Under the approach outlined, a community sanction is not an alternative to a custodial sanction. A sentencer should only be considering custody when all non-custodial options have been

rejected. However, although there might appear to be a principled or logical distinction between custody and non-custody, in practice, the distinction will sometimes be less clear. In some circumstances, judges will find it difficult to choose between a custodial and non-custodial disposal.

The "Custody Threshold"

The question is how to define the "custody threshold".[14] Judges will find it easy to describe cases for which custody is always appropriate and cases for which custody is never appropriate. They will find it much more difficult to describe their decision-making around the threshold. At what point is it necessary to send an adult offender to prison for the first time? How many attempts at probation should be permitted before the court sends a recidivist offender to prison? How serious does a crime have to be to reach the custody threshold? These and other similar questions have no easy answers. Sentencers have few rules to guide them and exercise wide discretion. When judges are asked to provide accounts of the way they approach the use of short prison sentences, they are likely to respond that they use prison when no other sentence is "appropriate". This raises the question of what "appropriate" means. The practical meaning of "appropriate" can be discerned by looking at what judges do rather than what they say. Sentencing policy is, *de facto*, what the courts do, but this is not articulated.

One might hope to find a more authoritative and explicit account of the meaning of "appropriate" in the judgments of the Court of Appeal on summary sentencing appeals. The test applied by the Court of Appeal is not whether the sentence is that which would have been passed by the Appeal Court, but whether the sentence falls within the broad bounds of what would be considered a reasonable sentence for the case.[15] The standard academic texts on sentencing in Scotland have all been written by distinguished practitioners.[16] Each has produced comprehensive reviews of the sentencing appeal decisions of the Court of Appeal. None of them has been able to produce anything which comes close to a statement of the sentencing policy of the Court. The reports of these decisions typically list the facts and circumstances of the case (as evidence that all "relevant" matters have been "taken

[14] For recent English research on this issue, see M. Hough, J. Jacobson and A. Millie, *The Decision to Imprison: Sentencing and the Prison Population* (2003).

[15] Sheriff Andrew Lothian has suggested that two cases in 2002 provide some support for the argument that the Appeal Court is, on occasion, willing to act as a court of review rather than appeal (see "Court of Review or Court of Appeal?" (2002) 47(2) J.L.S.S. 38). In *Gallagher v Watt*, 2002 G.W.D. 1–37 and *Dillon v H.M. Advocate*, 2002 G.W.D. 1–36, the Appeal Court reduced sentences which the court argued were, in the *Gallagher* case, "not wrong" and, in the *Dillon* case, "difficult to criticise when looked at on their own". These cases, by themselves, are not enough to disturb the normal understanding of the role of the Appeal Court.

[16] C. G. B. Nicholson, *The Law and Practice of Sentencing in Scotland* (2nd ed., 1991); N. Morrison, *Sentencing Practice* (2000); D. Kelly, *Criminal Sentences* (1999).

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[17] 2002 G.W.D. 1–30.

[18] Scottish Executive, *Youth Court*

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into account") and conclude that the sentence was (or was not) within the broad bounds of what would be considered a reasonable sentence. The judgments rarely refer to any principles of sentencing, still less to any "policy" concerning the use of prison sentences. There is very rarely an attempt to explain how the nature and quantity of the sanction related to specific facts and circumstances of the case. For example, in *Ali v Ritchie*,[17] the Appeal Court reduced a sentence of six months to 240 hours' community service. The mitigating factors mentioned in the report included the impact of imprisonment on the offender and his family, and the fact that this was his first offence. There is, however, no explanation of any principled approach to how these factors should affect sentence choice. The case offers little assistance to predict the impact of these factors in other cases.

How is this absence of sentencing policy to be explained? In my view, the answer lies in the way in which judges perceive their role as sentencers. The two key concepts are judicial independence and individualised sentencing.

Independence of the Judiciary

Scottish judges, at least those salaried officials, are jealous of their independence. Judicial independence is almost ritually asserted as a defence to any attempts to regulate sentencing or to involve the judiciary in debate about sentencing policy. There follow two recent examples from Scottish public affairs.

The Justice 1 Committee of the Scottish Parliament recently published the report of the review into alternatives to custody. The Committee were concerned to find ways to increase the use of community sanctions. They did not, however, feel able to consider sentencing guidelines as a means of achieving this end, as judicial independence was held to be outside the remit of the Committee's work.

The report of the Youth Court Feasibility Project Group was published by the Scottish Executive in December 2002 and has paved the way for the development of a pilot Youth Court which began in Hamilton Sheriff Court in June 2003. The Group were required by the Executive to develop an explicit set of objectives for the Youth Court. These are concerned with reducing the frequency and seriousness of re-offending, the promotion of social inclusion and the enhancement of community safety. The Youth Court is sited within the sheriff court. This court as a whole has no explicit set of objectives. Traditionally, sentencing has been the prerogative of the judiciary, and any statement of sentencing policy has always been avoided. The Group thus felt obliged to preface the section on "objectives" with the following qualification[18]:

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[17] 2002 G.W.D. 1–30.
[18] Scottish Executive, *Youth Court Feasibility Project Group Report* (2002).

> "In developing the model for a Youth Court, the Group was aware of the need to respect the independence of the judiciary and the Crown in making decisions in individual cases, an independence which is enshrined in our constitution and criminal justice system. Our report deals with many procedural and court matters and so our proposals seek to develop a model of how we believe a Youth Court might best operate although we acknowledge that it cannot be prescriptive, particularly on how sheriffs should discharge their shrieval function. The model, if implemented in practice, is dependent on providing courts with additional resources and disposals for sheriffs to use as they deem appropriate in individual cases."

On the one hand, this report proposes an integrated approach to the fast tracking of recidivist young offenders through the court, with the 10 agencies involved working closely together towards the same objectives. This work includes the design of an "action plan" for addressing the offending behaviour of the offender. On the other hand, the proposals accept that the decision on the appropriate disposal for the offender rests with the sheriff, whose independence is sacrosanct.

What Does Judicial Independence Mean?

The doctrine of separation of powers provides that the judicial branch of government should be separate from the executive arm of government. Judges are not civil servants, responsible for implementing government policy. There is no space in this article, nor does this author have the necessary expertise, to pursue the debates over separation of powers in the academic constitutional law literature.[19] It is enough to note that the theoretical distinction between judiciary and executive becomes blurred when one looks at judicial practice.

Legislation already places limits and restrictions on judicial discretion in sentencing. There are many maximum penalties laid down in statute, for a range of offences. Section 205B of the 1995 Criminal Procedure (Scotland) Act (as inserted by s.2 of the Crime and Punishment (Scotland) Act 1997) provides for a mandatory minimum penalty of seven years for a third offence of drug trafficking. There is a mass of provisions which, for example, prevent a judge from sending an adult offender to prison for the first time without having ordered a social enquiry report. There is little doubt that Parliament has the power to regulate sentencing. Judges in North American jurisdictions would accept this point without question, although they may disapprove of the specific form of the sentencing legislation.[20] Judges may be "independent" from the Executive. This independence does not mean that judges would not

[19] See A. Ashworth, *Sentencing and Penal Policy* (1993).
[20] M. Tonry, *Sentencing Matters* (1996), p.181.

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[21] See Hough *et al.*, above, n.14, p.27 f
[22] A. Freiberg, in C. Clarkson and R.
[23] M. Tonry, *Sentencing Matters* (1996),
[24] C. Tata and N. Hutton, "What Rule
Sociology of Law at 339–360.

be obliged to enforce whatever sentencing legislation Parliament decided to introduce.

Another sense of judicial independence might be that because judges are appointed and not elected, they are not subject to the same pressures to respond to perceived public opinion as are politicians, who must have an eye on re-election. However, judges often refer to the need to keep in touch with and to reflect the mood of the public.[21] After all, judges perform their task of allocating punishment on behalf of the community. This begs the question of the ways in which judges are or should be accountable to the public. The taxpayer increasingly expects best value in criminal justice, in the same way as any other public service. Independence does not mean that the judiciary can ignore public opinion or the demands and expectations of the people who pay their salaries. This is really an argument about accountability. Traditionally, judges are accountable only to the Court of Appeal for their sentencing practices. This is a very limited form of public accountability. Independence should not mean that there are no methods or procedures for assuring greater accountability.

Finally, independence may refer to the way in which judges conceive of sentencing. An individualised approach to sentencing emphasises the importance of dealing with each case as a unique combination of facts and circumstances. A "just" sentence is one which is appropriate in the light of all of these factors taken together. The process by which judges arrive at this sentence has been described by an Australian judge as "intuitive synthesis".[22] I discuss this at greater length below. For now, this approach raises the issue of consistency in sentencing. Clearly, consistency—treating like cases alike—is an important value of sentencing. How can an individualised approach produce consistency?

Michael Tonry argues that the association between wide discretion and disparity seems self-evident to everyone except some members of the judiciary.[23] He documents the considerable evidence collected over 20 years ago in the United States of disparity in sentencing. There has been little research in Scotland. There is only one piece of research which explicitly examined disparity in sentencing. A small case study carried out by the author with a colleague, over 10 years ago, looked at the patterns of custodial sentencing of 10 sheriffs in three neighbouring courts, controlling for the seriousness of their caseload to ensure that like was compared with like.[24] The study found that one sheriff consistently passed higher sentences than his colleagues. This confirmed the anecdotal evidence of local practitioners who worked in the

[21] See Hough *et al.*, above, n.14, p.27 for data on how English sentencers approach this issue.
[22] A. Freiberg, in C. Clarkson and R. Morgan, *The Politics of Sentencing Reform* (1995).
[23] M. Tonry, *Sentencing Matters* (1996), p.180.
[24] C. Tata and N. Hutton, "What Rules in Sentencing?" (1998) 26 *International Journal of the Sociology of Law* at 339–360.

courts and the judges who initially commissioned the research. This was a very small study and cannot be generalised to the country as a whole.

The statistics on sentencing patterns in sheriff courts produced annually by the Scottish Executive show wide variations in the average levels of fine and the proportionate use of custody.[25] These statistics have to be treated with caution because there is considerable variation in the nature and size of the caseloads between urban and rural districts. However, the evidence shows prima facie evidence of disparity.

The limited evidence suggests that there is disparity in sentencing across Scotland. This is unsurprising, given the lack of any sentencing policy and the wide discretion enjoyed by sentencers.

Individualised Sentencing

As noted above, the standard judicial approach to sentencing can be characterised as individualised sentencing. Each case is unique. A "just" sentence emerges from an holistic appreciation of all of the relevant facts and circumstances of the case.[26] From this perspective, judges argue that it is impossible to describe a sentencing policy. The sheer number of potentially relevant facts and circumstances and the variations in the significance of these, depending on the context, make the articulation of sentencing policy impossible.

Providing some form of structured guidance on sentencing policy might be difficult, but it is not impossible, and has been achieved in many Western jurisdictions.[27] Sentencing is unavoidably comparative. Any assessment of the "appropriate" sentence for one case is dependent to some extent upon the sentences which have been passed for other cases—less serious, more serious and broadly similar. Consistency is an important value in just sentencing. While it might be extremely difficult to produce an objective definition of "similarity", because of the number of factors involved and the uncertainty of their significance, judges make judgments about similarity and difference every time they make a sentencing decision. As a matter of daily practice, judges use methods to evaluate and compare cases to help them reach what they think is a just sentence.

In a mundane sense, each case is unique, just as each individual is unique. However, this is a metaphysical point which has little relevance to the practical matter of sentencing. Cases, like individuals, share much in common. All practitioners with a moderate amount of court experience will be able to

[25] Scottish Executive, *Costs, Sentencing Profiles and the Scottish Criminal Justice System 2001* (2003), *www.scotland.gov.uk/library5/justice/c3061–00.asp.*

[26] C. Tata, "Conceptions and Representations of the Sentencing Decision Process" (1997) 24 *Journal of Law and Society* at 395–420.

[27] M. Tonry and R. Frase, *Sentencing and Sanctions in Western Countries* (2000).

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[28] M. Frankel, *Criminal Sentences:*

[29] N. Hutton, "Sentencing, Ratior *and Society* at 549–570.

[30] A. Ashworth, *Sentencing and Pe*

[31] A. Bottoms, "Compliance and *Challenges* (A. Bottoms, L. Gelsthor

[32] J. V. Roberts and M. Hough, *Attitudes to Punishment: Public Opi* 2002).

produce accounts of "typical" or "standard" cases, which form the bulk of their workload. There will also be fairly standard less serious and more serious varieties of these standard cases. There will be a "going rate" for these offences, which will be expressed as a range of penalties. Sometimes, the range will be broad and at other times narrow. Against this background, judges will assess the less frequently encountered cases, as well as those broadly typical cases that have some unusual or extraordinary feature which appears to be relevant for the purposes of sentencing.

The individualised approach to sentencing is, in Weberian terms, a pre-modern form of decision-making which seems increasingly anachronistic. As Marvin Frankel[28] argued over 30 years ago, discretionary sentencing is lawless. Individualised sentencing is remarkably similar to the khadi justice described by Max Weber in his sociology of law.[29] Sentencing is an ad hoc decision which is announced by the judge and justified on the basis of the authoritative office of the judge rather than by reference to any set of rational rules or principles.

Andrew Ashworth has argued that, in their use of "independence" to defend discretion in sentencing, judges mistakenly conflate two quite different processes.[30] In judging a civil matter, judges decide the facts of the case and apply the relevant legal rules, many of which will have been laid down in statute by Parliament. Judicial independence in this setting means that judges are not making policy but rather applying the law. In sentencing decisions, there are very few laws regulating judicial discretion. Judges cannot apply the law. In resisting attempts to introduce rules to promote more rational sentencing, which would constrain judicial discretion, judges are simply asserting their "ownership" of sentencing, which is ultimately incompatible with the principles of democratic self-government.

The fact that it is difficult to draw up an acceptable objective framework for just sentencing does not mean that we should not try to do our best, nor that we should simply trust judges as individuals to make just decisions. In another time, that might have worked but, as Bottoms has argued, in a late-modern society, citizens are increasingly likely to place their trust in abstract systems than in traditional office-holders.[31] Evidence for this is readily provided in the survey research data, which show a steadily diminishing confidence in criminal justice in general and judges in particular.[32]

Judicial independence does not or should not mean that individual judges can make sentencing decisions with no regard to the sentencing practices of

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[28] M. Frankel, *Criminal Sentences: Law without Order* (1972).

[29] N. Hutton, "Sentencing, Rationality and Computer Technology" (1995) 22 *Journal of Law and Society* at 549–570.

[30] A. Ashworth, *Sentencing and Penal Policy* (1993), p.191.

[31] A. Bottoms, "Compliance and Community Penalties" in *Community Penalties: Change and Challenges* (A. Bottoms, L. Gelsthorpe and S. Rex eds, 2001), pp.108–109.

[32] J. V. Roberts and M. Hough, "Public Attitudes to Punishment: The Context" in *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (J. V. Roberts and M. Hough eds, 2002).

their colleagues. It does not or should not mean that it is impossible to articulate systematic and rational procedures for pursuing consistency of approach in sentencing. Individualised sentencing has no rational justification nor does it provide an accurate account of sentencing practice. Judicial independence and individualised sentencing should not impede the development of a more rational approach to sentencing in Scotland.

Sentencing Policy for the Use of Short Custodial Sentences

My intention here is not to set out a policy but rather to explore the ways in which such a policy might be developed in Scotland. Obviously, the use of short-term sentences can only be part of a broader sentencing policy. It might be helpful to sketch some general features of a sentencing policy. There should ideally be some sort of rationale which explains what sentencing is trying to achieve and how these aims are to be realised in practice. The familiar list of justifications for sentencing—deterrence, rehabilitation, incapacitation, retribution and reparation—are mutually contradictory and are of little help in the attempt to provide a more consistent approach to sentencing.

A policy should have some means of ranking offences in order of seriousness and of ascribing appropriate ranges of penalties for particular offence categories. There is no reason why a policy on the use of short prison sentences could not be developed as a first stage towards a more general sentencing policy which could be developed in stages, as time and resources permitted.

The development of a sentencing policy does not mean the elimination of judicial discretion. What is required is an explicit rational structure which sets out a principled approach to sentencing, within which the exercise of judicial discretion can operate. It is not a choice between art and science; it is about setting explicit boundaries which enable discretion to be exercised in a more rational and consistent manner.[33]

What Has Been Done Elsewhere?

There is no space here for a detailed discussion of the sentencing reforms adopted in other jurisdictions. However, a brief sketch demonstrates that there have been a range of different approaches taken to resolve the ubiquitous difficulties of rational reform of sentencing. Reforms might be placed on a continuum, according to the extent to which the reforms restrict judicial discretion. At one end would be found the more mechanistic systems of numerical guidelines, of which the US Sentencing Commission Guidelines,

[33] A. Ashworth, "The Decline of English Sentencing and Other Stories" in *Sentencing and Sanctions in Western Countries* (M. Tonry and R. Frase eds, 2001).

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[34] K. Stith and J. A. Cabranes, *Fe*
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[35] K. Reitz, "The Disassembly and
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which regulate sentencing in the Federal Courts, are the most restrictive example. These allow very little scope for discretion and, as some have argued, create new forms of injustice and inconsistency because they do not take account of relevant factors and produce substantively unjust sanctions.[34] However, in most US states, where guidelines have been adopted, judges support and implement the guidelines.[35] Each system allows different levels of scope for the exercise of discretion—some are mandatory with broad ranges, some allow departures for broadly defined reasons, some are voluntary, etc. They pursue consistency by providing ranges of appropriate sanctions for broadly defined offences.

Guidelines in other jurisdictions are different. In the Netherlands, the Prosecutor's office uses a system to ascribe cases to particular categories which have recommended sentence ranges attached.[36] This information is provided for the court. In some jurisdictions, such as Finland and Norway, there are legislative guidelines which help judges to ascribe cases to particular categories, each of which has a presumptive range of sanctions attached. There is also a list of aggravating and mitigating factors which can be taken into account.[37]

The recent Criminal Justice Act 2003 has established a new agency in England and Wales—the Sentencing Guidelines Council (SGC)—which will produce sentencing guidelines, in consultation with the existing Sentencing Advisory Panel (SAP), in much the same way as the SAP currently works with the Court of Appeal in England and Wales. The guidelines will be produced on a piecemeal basis, as suggested by the SAP and/or the Secretary of State. They will not be binding, and there are no plans to monitor judicial adherence to the guidelines. The most recent guidelines issued by the (English) Court of Appeal, on domestic burglary, might give an indication of the form SGC guidelines might take. Four levels of domestic burglary are identified, referring to a baseline "standard" burglary. (The SAP collected evidence on public perceptions and attitudes to burglary which formed part of their report.) "Starting" points are suggested for sentencing, showing how criminal record should affect the choice of sentence. A non-definitive list of mitigating factors is also provided.[38]

All of these approaches are normative, *i.e.* to a greater or lesser extent, they advise judges of the appropriate sanction for a particular offence category.

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[34] K. Stith and J. A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998).

[35] K. Reitz, "The Disassembly and Reassembly of US Sentencing Practices" in *Sentencing and Sanctions in Western Countries*, above, n.33.

[36] P. J. Tak, "Sentencing and Punishment in the Netherlands" in *Sentencing and Sanctions in Western Countries*, above, n.33.

[37] T. Lappi-Seppälä, "Sentencing and Punishment in Finland, The Decline of the Repressive Ideal" in *Sentencing and Sanctions in Western Countries*, above, n.33.

[38] N. Hutton, "Sentencing Guidelines" in *Confronting Crime* (M. Tonry ed., 2003).

The Sentencing Information System (SIS), operating in the High Court in Scotland, is different. It is not normative. It simply provides judges with information about the past practice of the court. If we want to change that practice, the SIS alone is unlikely to be effective. However, if the judges decide that they want to change their practice, then this kind of information system can offer judges a sophisticated means of finding out what the court has been doing and, thus, a means of pursuing a more consistent approach to sentencing. This has been described as a form of judicial self-regulation.[39]

Who Should Devise Sentencing Policy?

Sentencing policy in Scotland remains very firmly in the hands of the judiciary. The advantage of this is that it removes sentencing policy from the short-term demands of electoral politics. The disadvantage is that the policy remains unarticulated. Public debate is stifled and poorly informed. My own view is that judges ought to continue to make sentencing policy. This is for two main reasons.

Judicial Experience

Most (although, not all) judges have long experience of working in the criminal courts. They know about both the familiar, everyday stories and the more extraordinary tales that are encountered in court. They know how difficult it is to draw up rules which will produce a working definition of "seriousness". Judges are committed to justice, although they may differ as to exactly how they would define justice.

Effective Sentencing Reform

The limited research evidence suggests that where sentencing reforms have been introduced, they have worked most effectively when judges have been closely involved in the development of the reforms. This is true of guidelines in the United States and Information Systems in New South Wales and Scotland. It is also interesting to note that the provisions on sentencing guidelines in the Criminal Justice Act 2003 for England and Wales leave the control of guidelines in the hands of the judiciary (in the form of the Sentencing Guidelines Council, members of which are all judges).

The Mechanics of Sentencing Reform?

There are a number of ways in which the development of sentencing policy could be approached. Scotland could follow the example of England and

[39] N. Hutton and C. Tata, "The Judicial Role in the 'Balance' between Two Visions of Justice in Sentencing" in *The Judicial Role in Criminal Proceedings* (S. Doran and J. Jackson eds, 1999).

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[40] Home Office, *Making Punishm*
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[41] A Partnership for a Better Scc
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Wales and commission a Halliday-type report,[40] followed by legislation setting up an institutional framework for the incremental production of offence-based guidelines. The Sentencing Commission, recently established by the Scottish Executive, might provide an institutional home for the process of sentencing reform.[41]

How might judges take matters into their own hands? The judiciary in the High Court have already shown the way, with their initiation of the High Court Sentencing Information System. What might sheriffs do? There is no formal institutional mechanism for sheriffs to operate as a corporate entity. However, this could possibly be achieved through the Sheriffs' Association, the Judicial Studies Committee or indeed through the Sentencing Commission.

Sentencing Guidance for the Sheriff Court

The task of developing a comprehensive system of sentencing guidance, covering the entire jurisdiction of the sheriff court, would require significant resources. The same would apply to the development of a sentencing information system for the sheriff court. A comprehensive SIS might be less helpful for the sheriff court than for the High Court because of the volume of cases and the much more extensive use of non-custodial disposals. However, an SIS would provide a useful descriptive starting point for the development of guidance.

The Court of Appeal could begin to issue guideline judgments aimed at sheriff court cases, along the lines of the Court of Appeal in England. The limitations of this sort of incremental approach are, first, that the implications for sentencing other offences might be unclear and, secondly, that, in drawing up guidelines for one offence, the Court would inevitably be making principled decisions about factors such as the impact of previous convictions, which would have clear implications for other offences.

A novel approach, which, so far as I am aware, has not been tried elsewhere, would be for the sheriffs to take a sentencing issue that is a matter of current public concern and devise a means of developing guidance for themselves on this issue. One such issue might be the use of short-term custodial sentences of six months or less.

How Would Guidance Be Constructed?

The first step would be to collect the available information to try to determine the nature of the issue. What are the trends in the use of short prison

[40] Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (2001).

[41] A Partnership for a Better Scotland: Partnership Agreement. *www.scotland.gov.uk/library5/government.*

sentences? What offences and what offenders receive these sentences? What are the re-offending rates? How effective are these sentences in reducing offending behaviour? What alternative sanctions are available to the court? How effective are these? What are the relative costs of different sanctions? What impact does the level of short-term sentencing have on the Scottish Prison Service?

There is already a significant body of information available, much of which was summarised in the first part of this article. It might, however, be helpful to collect more detailed information.

The task for the sheriffs would be to review the evidence, develop a principled approach to the use of short prison sentences and draft guidance for judges which described the sort of cases where prison was appropriate and the sort of cases where prison was generally inappropriate. In other words, the guidance would describe a principled approach to the use of short custodial sentences. This would involve something more than a bland statement that custody should only be used when no other sentence is appropriate but would try to flesh out what is meant by "appropriate".[42]

There are lessons to be learnt from other European jurisdictions, including Scandinavian countries and the Netherlands, as well as, of course, from England and Wales. The guidelines would articulate a principled approach to the impact of previous convictions on sentencing policy for these sorts of cases. The latest guideline judgment from the Court of Appeal in England and Wales on domestic burglary gives very clear and explicit guidance to judges on the extent to which recent and relevant criminal convictions ought to affect the sentence for different "grades" of domestic burglary.[43] It would be possible for the sheriffs to draw up general guidance on the appropriate impact of criminal record on the use of short-term prison sentences.

It would be a mistake to be too prescriptive about the form that the guidance should take. This will be a decision for the sheriffs, based on the evidence they collect and their views as to how best to assist their colleagues' decision-making.

In some jurisdictions, sentencing policy takes into account the resources available for criminal justice. If this approach were adopted, projections of the impact of these guidelines on prison populations and on the demand for community sanctions would have to be commissioned so that the costs and benefits of the guidance can be assessed and adjusted, if necessary. It would also be important to monitor the use of short-term custodial sentences so that the effects of the guidance can be evaluated. This needs to become a permanent responsibility of some agency.

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[42] Some useful preliminary work on this issue has recently been published. See M. Hough, J. Jacobson and A. Millie, *The Decision to Imprison: Sentencing and the Prison Population* (2003).

[43] Sentencing Advisory Panel, *Domestic Burglary: The Panel's Advice to the Court of Appeal* (2002), *www.sentencing-advisory-panel.gov.uk/c_and_a/advice/dom_burglary/page1.htm.*

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The Court of Appeal in England and Wales issues guidelines for particular offences, but not guidelines which cut across offence categories. This would be a new challenge. However, judges already make these decisions every day in court. All that is being asked is that judges work together to explain to each other and to the community how these decisions should be made. The guidance should be published but should be voluntary and would not require legislation. They should be reviewed regularly on the basis of evidence collected on the impact of the guidelines and reflections from judges on their utility.

Conclusion

This proposal is an example which tries to suggest how judges might contribute to the development of a more rational sentencing policy on an issue of current public concern. It does not seek to remove judicial discretion or challenge the independence of the judiciary but rather to engage the judiciary in the development of a more rational sentencing policy. The proposal is for something new, but a small jurisdiction with newly gained political independence and short lines of communication between the main criminal justice stakeholders should be able to aspire to this kind of project.